

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAPHAEL BELL,

Defendant-Appellant.

UNPUBLISHED

September 14, 2010

No. 290536

Wayne Circuit Court

LC No. 08-011601-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS MCDONALD,

Defendant-Appellant.

No. 290596

Wayne Circuit Court

LC No. 08-011601-FC

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Following a joint jury trial with a single jury, defendant Bell was convicted of armed robbery, MCL 750.529, and possession of a firearm while committing a felony (felony-firearm), MCL 750.227b, and defendant McDonald was convicted of armed robbery, MCL 750.529. Defendant Bell was sentenced to serve two years in prison for the felony-firearm conviction, and he received a consecutive prison sentence of ten to twenty years for the armed robbery conviction. Defendant McDonald was ordered to serve a prison sentence of five to fifteen years. Defendants appeal as of right. We affirm.

Defendants' convictions arose as a result of an armed robbery that occurred during the early morning hours of August 5, 2008. According to the testimony of the victim, defendant Bell was armed with a handgun and demanded the victim's property. Defendant McDonald accompanied defendant Bell and retrieved the victim's belongings at defendant Bell's instruction.

In Docket No. 290536, defendant Bell argues that he was denied effective assistance of counsel because trial counsel failed to object to the introduction of other-acts evidence related to a different robbery involving defendant Bell. We disagree.

In order to preserve a claim of ineffective assistance of counsel, a defendant should move for a new trial or request an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant Bell failed to take either action. Thus, this issue is unpreserved. Review of unpreserved claims of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In addition, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2006).

In order to prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that he was denied effective assistance of trial counsel because counsel failed to object to the introduction of evidence that should have been excluded under MRE 404(b). MRE 404(b) permits the introduction of other acts so long as it does not "risk impermissible inferences of character to conduct." *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001) (internal citation and quotation marks omitted). Permissible uses of other-acts evidence include "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. . . ." MRE 404(b). MRE 404(b) is a rule of inclusion rather than a rule of exclusion. *People v Katt*, 248 Mich App 282, 303; 639 NW2d 815 (2001).

At trial, the jury heard evidence related to the charged robbery, as well as evidence related to an additional robbery involving defendant Bell. The charged robbery and the additional robbery were substantially similar. Both robberies occurred in the same general geographical area, within days of each other, and occurred at night. During both robberies, defendant Bell was armed and accompanied by at least one additional individual. Also common to both robberies was the use of a nearby black Chevrolet Impala from which the robbers approached the victims on foot. These substantial similarities permitted the introduction of the evidence related to the additional robbery for the purpose of establishing defendant Bell's identity as the perpetrator of the charged offense or to show the use of a common scheme or plan. Either purpose is acceptable under the court rule. MRE 404(b).

In addition, we find unpersuasive defendant's argument that the challenged testimony should have been excluded under MRE 403 because it was more prejudicial than probative. First, the evidence of a substantially similar robbery was highly probative. Second, the trial court provided multiple limiting instructions to the jury over the course of the trial regarding the

evidence related to the other robbery. See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Accordingly, we reject defendant Bell’s argument that he was convicted because the jury believed he was likely to commit crimes; indeed, the jury was specifically prohibited from doing so.

Because the evidence related to the other robbery was properly admitted and was not unfairly prejudicial, trial counsel was not required to object to its admission. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (defense counsel is not required to advocate a meritless position). Accordingly, defendant Bell’s claim that he was denied effective assistance cannot succeed.

In Docket No. 290596, defendant McDonald first argues that his constitutional rights were violated when his case was consolidated with defendant Bell’s. We disagree.

We review a trial court’s decision to try defendants separately or jointly for an abuse of discretion. MCL 768.5; *People v Hicks*, 185 Mich App 107, 117; 460 NW2d 569 (1990). As a general matter, a criminal defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). In fact, for reasons of judicial economy and administration, joint trials are favored as a matter of public policy. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Our Supreme Court has addressed joinder under MCR 6.121 and has concluded that a defendant is not entitled to severance as a matter of law simply because the defendant and his or her codefendant have antagonistic defenses. *People v Hana*, 447 Mich 325, 348; 524 NW2d 682 (1994), amended 447 Mich 1203 (2004). For severance to be mandated, the defenses asserted by the respective defendants must be “mutually exclusive or irreconcilable.” *Id.* at 349 (internal citations and quotation marks omitted).

Notably, defendant McDonald does not argue that his defense was mutually exclusive or irreconcilable with the defense of defendant Bell. Instead, defendant McDonald maintains that severance was necessary because evidence was introduced related to the additional robbery. The *Hana* Court recognized that “[i]ncidental spillover prejudice . . . is almost inevitable in a multi-defendant trial,” yet concluded that such incidental prejudice does not necessitate severance. *Hana*, 447 Mich at 349 (internal citation and quotation marks omitted). Rather, “[t]he tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.” *Id.* (internal citation and quotation marks omitted). In addition, the risk of prejudice from a joint trial may be overcome by a proper cautionary instruction. See *id.* at 356. Here, the jury was instructed multiple times that the evidence related to the additional robbery could only be used during its consideration of the charges against defendant Bell. As noted above, jurors are presumed to follow their instructions. *Abraham*, 256 Mich App at 279. Hence, the trial court did not abuse its discretion in consolidating the trial.

Defendant McDonald also argues that the pretrial identification procedure violated his constitutional rights. We disagree.

A trial court’s ultimate decision regarding a motion to suppress is reviewed de novo. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, a trial court’s decision to admit identification evidence will not be reversed unless it is clearly erroneous.

People v Kurylczuk, 443 Mich 289, 303; 505 NW2d 528 (1993). “Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

Defendant McDonald initially argues that the identification procedure was impermissible because a photographic lineup, rather than a corporeal lineup, was used.¹ Generally, when an accused is in custody, identification by photographic lineup should not be made, unless a legitimate reason for doing so exists. *Kurylczuk*, 443 Mich at 298. Circumstances that would justify the use of a photographic lineup even when the accused is in custody include situations in which: (1) it is not possible to arrange a proper lineup; (2) there is an insufficient number of persons that share the characteristics of the accused and that are available to participate in a corporeal lineup; (3) immediate identification is required; (4) the witnesses are distant from the locations where the accused is in custody; or (5) the accused refuses to participate in the lineup. *People v Davis*, 146 Mich App 537, 546; 381 NW2d 759 (1985).

At the *Wade*² hearing, the lead investigator testified that she made unsuccessful efforts to assemble a corporeal lineup before resorting to a photographic lineup, including calls to all of the other districts looking for prisoners that had sufficiently similar builds to the suspects. Defendant has not presented evidence to contradict this testimony. Using a photographic lineup when there are insufficient numbers of individuals in custody for an appropriate corporeal lineup is permissible. *Id.* Thus, defendant has not shown that his constitutional rights were violated when the witnesses were asked to view a photographic lineup.

Defendant argues in the alternative that the photographic lineup procedure was unduly suggestive. We disagree.

An identification procedure violates a defendant’s right to due process of law when it is “unnecessarily suggestive and conducive to irreparable misidentification” *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Defendant appears to take issue with the facts that the witnesses were all asked to view a photographic lineup near the same time, and that each suspect’s photograph appeared in the fourth position of the respective lineup. However, defendant has provided no authority to support his assertion that an identification procedure is unduly suggestive when the witnesses view a photographic lineup near in time to each other or when multiple suspects are placed in the same position in respective lineups. “A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.” *People v Mackle*, 241 Mich App 583, 604, n 4; 617 NW2d 339 (2000).

In any event, we find that there is no evidence in the record demonstrating that the photographic lineup was impermissibly suggestive such that it led to a substantial probability of misidentification. All three witnesses testified that they were not coached during the lineup

¹ Although defendant Bell also took part in the photographic lineup, he does not raise this issue in his appeal.

² *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

process. Also, the victim in the instant case testified that he was sure of the identification when it was made and remained positive at trial.

Because the use of a photographic lineup was appropriate in the instant case and the identification process was not unduly suggestive, the trial court did not abuse its discretion in failing to suppress the identification evidence.

Affirmed.

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

/s/ Donald S. Owens